

MAILED 5/19/98

In the Matter of: *
*
Richard H. Carroll *
Claimant *
*
against *
*
General Dynamics Corporation *
Employer/Self-Insurer *
*
and *
*
Director, Office of Workers' *
Compensation Programs, United *
States Department of Labor *
Party-in-Interest *

Case Nos.: 97-LHC-1836/1837
98-LHC-676
OWCP Nos.: 1-121995/126129/
73156

Appearances:

Richard H. Carroll, **Pro Se**
For the Claimant

Lance G. Proctor, Esq.
Senior Trial Attorney
For the Employer/Self-Insurer

Merle D. Hyman, Esq.
For the Director

Before: **DAVID W. DI NARDI**
Administrative Law Judge

DECISION AND ORDER - DENYING BENEFITS

This is a claim for workers' compensation benefits under the the Longshore and Harbor Workers' Compensation Act as amended (33 U.S.C. §901, **et seq.**), herein referred to as the "Act." The hearing was held on March 2, 1998 in New London, Connecticut at which time all parties were given the opportunity to present evidence and oral arguments. The following references will be used: TR for the official hearing transcript, ALJ EX for an exhibit offered by this Administrative Law Judge, CX for a

Claimant's exhibit, DX for a Director's exhibit and RX for an Employer's exhibit. This decision is being rendered after having given full consideration to the entire record.

Post-hearing evidence has been admitted as:

Exhibit No.	Item	Filing Date
CX 136A	Claimant's letter filing the following evidence	03/09/98
CX 136	Attorney Shafner's letter to Michael J. Halperin, M.D., Dated 2/23/96	03/09/98
ALJ EX 28	This Court's ORDER relating to the renumbering of Claimant's exhibits	03/10/98
CX 137A	Claimant's letter filing the following evidence	03/11/98
CX 137 ¹	Social Security Administration Decision, Dated 3/3/98	03/11/98

¹ Claimant seeks to introduce the Social Security Administration Decision for the substantive purpose of rebutting the medical opinions of Dr. Philo F. Willetts. (CX 105, CX 106; RX 9, RX 21) This Administrative Law Judge routinely admits into evidence such decisions because they are relevant and material to the case in that the Social Security Administration ("SSA") is entitled to an offset or reduction in benefits for any benefits awarded in this proceeding. This Judge does realize that the Social Security Administration Decision cannot be admitted for substantive purposes because the SSA decision is adjudicated under another statute which provides for a different burden of proof regarding the nature and extent of liability. In this regard, **see Hunigman v. Sun Shipbuilding and Dry Dock Co.**, 8 BRBS 141 (1978) and **Jones v. Midwest Machine Movers**, 15 BRBS 70 (1982), **aff'd** 840 F.2d 20 (7th Cir. 1988), where the Board held that such evidence is not dispositive in a hearing under the Longshore and Harbor Workers' Compensation Act, but the evidence can be relevant to the proceeding. Furthermore, the SSA decision awarding benefits is based on the cumulative effect of all of Claimant's injuries, whereas Dr. Willetts's opinion as to disability focuses on Claimant's back injury.

ALJ EX 29	This Court's ORDER relating to the renumbering of Claimant's Exhibits submitted post-hearing	03/18/98
ALJ EX 30	This Court's ORDER closing the record and setting briefing schedule	03/31/98
CX 138	Claimant's Brief	04/20/98
RX 22	Employer's Brief	04/28/98

The record was closed on April 28, 1998 as no further documents were filed.

Stipulations and Issues

The parties stipulate² (TR 13-17), and I find:

1. The Act applies to this proceeding.
2. Claimant and the Employer were in an employee-employer relationship at the relevant times.
3. On November 22, 1991 and December 3, 1992, Claimant suffered injuries in the course and scope of his employment.³

² At the hearing, Claimant sought a stipulation that Electric Boat is a federal contractor who contracts in excess of \$10,000 a year. Claimant's proposed stipulation clearly relates an intention to pursue a claim with the Office of Federal Contract Compliance Programs. As there is no OFC case before this Administrative Law Judge, such a claim begins with a complaint to another division of the Department of Labor, Claimant's proposed stipulation was excluded as irrelevant and immaterial to this proceeding.

³ The parties could not agree on the date of the third injury. Employer believed the correct date to be February 18, 1983, the date on the Form LS-202. (RX 3) Claimant stated the correct date is March 9, 1982, as the yard hospital files referred back to that injury date. (TR at 19; CX 1-2, 5). Claimant explained that two LS-203 forms were filed, the first contained a date of injury of February 18, 1983, the same date the form was filed. The amended LS-203 contained a date of injury of February 9, 1982 and a filing date of February 18, 1983. (TR at 20; CX 61, CX 62). The yard hospital records and the amended LS-203 point to the existence of an injury on March 9, 1982, and I so find and conclude.

4. The parties complied with all notice, claim and controversion provisions.

5. The applicable average weekly wage for the November 22, 1991 injury is \$690.70, and the applicable average weekly wage for the December 3, 1992 injury was \$608.59.

6. The Employer voluntarily and without an award has paid temporary total compensation from November 23, 1991 through December 14, 1991 at the compensation rate of \$460.46, for a total of \$1,447.16; and temporary total compensation from July 3, 1995 through October 4, 1995 at the compensation rate of \$405.72, for a total of \$5,448.20.

The unresolved issues in this proceeding are:

1. Claimant's entitlement to medical benefits for his November 22, 1991 back injury.

2. Entitlement to payment of certain unpaid medical bills and reimbursement for travel expenses.

3. Authorization of Dr. Frank W. Maletz and Dr. Jeffrey A. Salkin as treating physicians for all of Claimant's combined injuries.

PROCEDURAL HISTORY

This Administrative Law Judge, by **Decision and Order Awarding Benefits**, dated April 23, 1996, concluded, **inter alia**, that Claimant sustained a work-related injury to his right leg on February 24, 1993 and that such injury had resulted in work absences for certain periods of time. Accordingly, Claimant was awarded, **inter alia**, benefits for his temporary total disability benefits from February 24, 1993 through September 12, 1994, based upon his average weekly wage of \$715.90, pursuant to Section 8(b) of the Act. Claimant was also awarded benefits for his twenty percent (20%) permanent partial disability of the right leg, pursuant to Section 8(c)(2), and such benefits were to commence on September 13, 1994.

While Claimant sought permanent total disability benefits as of September 13, 1994, Claimant was not awarded any additional benefits because Claimant's right leg injury, as a so-called schedule injury under the Act, was subject to the well-settled **Pepco** doctrine and the twenty (20%) percent rating by the doctor as this Administrative Law Judge, accepting the Employer's Labor Market Survey, concluded that the Employer had established the

availability of suitable alternate employment or realistic job opportunities for the Claimant.

Claimant timely appealed from said decision and the Benefits Review Board, by **Decision and Order** issued on June 6, 1997, vacated the decision and remanded the matter to this Administrative Law Judge for a reconsideration of the evidence relating to the issue as to whether the Employer had established the availability of suitable alternate employment within the work restrictions imposed by Dr. Salkin.

After comparing the Claimant's medical restrictions to the alternate jobs proposed by Employer, this Administrative Law Judge, by **Decision and Order on Remand-Awarding Benefits** dated September 25, 1997, found that Employer had not sustained its burden of establishing suitable alternate employment as Claimant could not perform any of the jobs identified by Mr. Takki as those jobs exceeded or contravened the physical limitations imposed by Dr. Salkin.

By **Amended Order**, this Administrative Law Judge ordered, **inter alia**, the Employer as a self-insurer to pay the Claimant compensation for his temporary total disability from February 24, 1993 through September 12, 1994, based upon an average weekly wage of \$715.90, pursuant to Section 8(b) of the Act. Claimant was also awarded compensation benefits for his permanent total disability commencing on September 13, 1994, and continuing thereafter for 104 weeks, plus the annual adjustments provided in Section 10 of the Act, based upon an average weekly wage of \$715.90, pursuant to Section 8(a) of the Act.

Claimant filed additional claims for benefits for alleged injuries sustained on February 18, 1983, November 22, 1991 and December 3, 1992. These claims are identified as 97-LHC-1837, 98-LHC-0676 and 97-LHC-1837, respectively. The Employer filed a Motion to Dismiss with regards to these claims, citing **Korineck v. General Dynamics Corp.**, 835 F.2d 42, 20 BRBS 63 (CRT) (2nd Cir. 1987). The Employer argued that Claimant's subsequent claims for benefits should be denied because the denial of additional benefits to one already receiving benefits for permanent and total disability serves to avoid double recoveries and does not violate equal protection or due process. This Administrative Law Judge by Order dated January 16, 1998 granted the Employer's motion, finding that as Claimant was currently receiving permanent total disability benefits based on his February 24, 1993 right ankle injury, and had been doing so since February 24, 1993, additional benefits for injuries cited by Claimant would constitute double recovery. It was also noted that the time periods for which Claimant sought

additional benefits were either after he became temporarily and totally disabled, or were for time periods for which he had already been paid. As there remained a dispute only as to continuing medical care for Claimant's alleged November 22, 1991 back injury, that issue was not dismissed, and is the subject of the present claim.

SUMMARY OF THE EVIDENCE

Richard H. Carroll ("Claimant" herein), fifty-four (54) years of age, with a high school education and several courses at various colleges and an employment history of manual labor, began working in May of 1975 as a welder at the Groton, Connecticut shipyard of the Electric Boat Company, a division of the General Dynamics Corporation ("Employer"), a maritime employer adjacent to the navigable waters of the Thames River where the Employer builds, repairs and overhauls submarines. As a welder Claimant had to perform his assigned duties all over the shipyard and, after about eighteen (18) months, he transferred to work as an x-ray technician and he then had the duties of x-raying nuclear piping and nuclear reactors on the submarines. He daily spent about six hours each day on the boats.

Claimant's medical records reflect several incidents at the shipyard wherein his work activities resulted in strain and pain symptoms in the back. (TR 73-74)

Claimant's first claim is based on an incident which occurred on March 9, 1982. While walking along Pier 263, Claimant slipped on an icy patch, his legs split and he fell on his back. (CX 1-2, 5,61-62) Claimant went to the yard hospital where he reported the incident. He described pain from the left inguinal zone to left patella, especially over the sartorius muscle. An "acute muscle sprain" over the left upper leg and a "torso contusion" were diagnosed. An ice pack was applied to Claimant's thigh and he was restricted from ladders for the remainder of the shift. He was advised to see a doctor if his condition persisted or worsened. (CX 2) Claimant returned to the yard hospital on March 18, 1982, stating that his left knee remained painful from his March 9, 1982 injury. He was diagnosed with a left knee contusion/sprain. It was noted that Claimant had an upcoming appointment with Dr. Karno. (CX 3) Claimant visited the yard hospital on April 1, 1982, stating that his left knee was aggravated since his previous injury of March 9, 1982. It was noted that Claimant saw Dr. Karno on March 31, 1982, and he was given "Butazolodin and knee cage." On physical examination, Claimant's knee cage was in place and a contusion was noted on his lower back. (CX 5)

Claimant returned to the yard hospital on October 7, 1982 regarding his right ankle, which Claimant was reported to have injured in November of 1977 or 1978.⁴ (CX 7, CX 9) It is indicated that Claimant had an appointment with Dr. Brent on October 13, 1982. In a note dated October 19, 1982, Dr. Brent explained that Claimant was under his care for "post traumatic arthritis pain of the [right] ankle and [left] knee." The doctor found Claimant "fit for duty but [he] may have occasional disabling pain." (CX 8)

On October 30, 1982, Claimant reported to the yard hospital stating that he stepped of a large step, twisting his right knee and ankle and falling onto his left knee.⁵ On physical examination, Claimant's right leg was found to be painful, but there was no broken skin. It was noted that Claimant came to make out a report and that he will be seeing a doctor. (CX 10) Dr. Brent provided a note stating that he was treating Claimant for arthritis of the right ankle and left knee, and that Claimant was advised "to avoid sudden shocks as jumping or running, particularly with heavy burdens." (CX 12; RX 20) Claimant brought the note to the yard hospital on January 31, 1983 to put the note on file. (CX 11)

Dr. Brent provided a summary of his record regarding Claimant, which consisted of the following (CX 13):

"10/19/82- Pt. Has 2 chief complaints.

a) pain and limited motion rt. ankle since fracture 1978 (injured at work- 15% disability award) pain increasing with running and jumping- coaches soccer: therefore pain with demonstration- RX in past with active ROM exercises only-occasionally. RX original Dr. Karno lacks 15 degree active motion.

b) Pain and occasional swelling since twisting injury at work (fell on ice Jan. 1982)⁶ l. knee.

Full ROM and patella cryptitis- no major ligament loss; wears brace;
RX: SLR PRE quads- continue brace.

⁴ No Claim relating to this incident is presently before this Court.

⁵ No claim relating to this incident is presently before this Court.

⁶ This would appear to be referring to the March 9, 1982 injury, when Claimant slipped on an icy patch on Pier 263.

Lose weight (under RX suspected diabetes).

Pt. Has been given ROM exercises for ankle

Get lab fom (sic) Dr. Thompson- X-ray rt. ankle if symptoms persist- consider RX with Motrin, etc.
May be on uricomic meds for BP ?

Post traumatic arthritis R. ankle; L. knee.

Return 4 weeks. P. 60 BP100/70

"1/11/83

Temp. 98; P. 72; B/P 110/80

Pt. returns with two requests; one is for detailed evaluation of his ankle for work purposes- ? disability (refer back to Dr. Karno)

Second is for relief of ankle pain. Exam- ROM is somewhat improved but instep and ant. ankle tenderness present- also mild plantar fascitis.

RX: Motrin 600 T.I.D. Arthritis profile
Heat B.I.D. X-ray ankle (1/14/83)

He states left knee is improved.
Refer Dr. Karno for disability evaluation.
Ret. Here 2 weeks- call one week.

"1/28/83

Ankle is better on Notrin- advised to use it- cryptitis and swelling- persist at. times- avoid shocks- e.g. jumping & jogging-

Lose weight- continue Notrin 600 T.I.D. with meals or milk. Return six months for repeat arthritis profile. Ral + 1:119; ESR 22:

DX: Arthritis ? Rheumatoid with post-traumatic aggravation.

Dr. Martin L. Karno saw Claimant on June 13, 1983, and the doctor found that he "still had some pain in the ankle and difficulty in moving his foot," arising out of his 1977 fractured ankle. Dr. Karno explained that Claimant's "major problem is pain in the knee." On examination, the doctor found that there was "full extension and full flexion with mild atrophy" and "X-rays of his knee were unremarkable." Dr. Karno also indicated that he saw Claimant on March 31, 1982 with regard to Claimant's March 9, 1982

injury, and that his diagnosis was of "back sprain and patella femoral syndrome."⁷

Claimant's second claim concerns an incident which occurred on November 22, 1991. Claimant was working in the North Yard Ways when he "wrenched his back trying to close a broken personnel gate." (CX 77) An Employee Injury/Illness Case Report indicates that Claimant was diagnosed with a strain to the lower back. Claimant stated that he had "medicine at home for his back," and that he was "going home to take his own prescription medicine." (CX 9).

Claimant's initial choice of physician was Dr. Charles M. Parrot⁸ of the Nameaug Medical Centers, as he had been treating Claimant for a back sprain Claimant sustained while at home covering his pool. (TR 49) Dr. Parrot excused Claimant from work from November 18 to November 19, 1991 due to back pain. (RX 11-1) Dr. Parrot completed an Attending Physician's Report, indicating that he treated Claimant on November 22, 1991 and December 6, 1991. The nature of the treatment consisted of physical therapy, medication and a back brace. Upon physical examination, Dr. Parrot found Claimant positive for spasms, decreased range of motion and leg numbness. Dr. Parrot's diagnosis was back strain. (RX 12)

Dr. Ruth B. Donahue of the Nameaug Medical Centers saw Claimant on December 8, 1991 for the treatment of his back injury. Dr. Donahue found Claimant was "feeling somewhat better" but was "still getting occasional spasms." She also found Claimant was unable to work regular duty, and could only perform light duty. Claimant was limited to lifting no more than twenty (20) pounds. Claimant was instructed to continue his medications. (RX 11-3, 11-4) On December 11, 1991, Dr. Donahue noted that Claimant's "back feels better but feels tight." Claimant was feeling better, but complained of discomfort with movement. Claimant was instructed to stop all medications. (RX 11-5) Dr. Donahue restricted Claimant from regular duty from December 11, 1991 to December 14, 1991. (CX 86)

Claimant was seen by Dr. Richard A. Graniero of the Nameaug Medical Centers on December 15, 1991. Claimant stated that his back

⁷ Dr. Karno's report regarding the March 31, 1982 examination does not appear in the record.

⁸ Claimant explained that at the time he selected Dr. Parrot to be his treating physician, the doctor was a family physician, not an orthopedist. (TR 49) There is no evidence in the record that would indicate that subsequent to his selection as Claimant's treating physician the doctor became an orthopedic specialist.

was better. Dr. Graniero noted that Claimant's back felt stiff in the lower right area, and there was no leg weakness or numbness. Dr. Graniero instructed Claimant to begin back exercises (pelvis tilt, etc.), to wear his back brace, and return in one week. Dr. Graniero found Claimant could return to full duty. (CX 86)

Claimant returned to work on December 15, 1991. Although he continued to be treated by several physicians for various medical conditions and injuries, **Claimant did not treat with anyone between December 1991 and August 14, 1996 for his back.** (TR 95) Claimant testified that he has had problems with his "back for years but it never bothers enough at one time." (TR 94) He explained that the records of Dr. Joseph Zeppieri, with whom Claimant was treating for dorsal wrist syndrome, did not contain information on his back injury because he was not seeing Dr. Zeppieri for that particular purpose. (**Id.**) However, I note that Dr. Zeppieri is an orthopedic physician.

A letter dated February 23, 1996 from Claimant's former counsel, Nathan Julian Shafner, Esquire, to Dr. Michael J. Halperin, indicated that National Employer Company had authorized a one time evaluation regarding Claimant's back injury. (CX 136) A new treating physician became necessary due to the involuntary absence of Claimant's former treating physician, Dr. Charles M. Parrot. (TR 47) Claimant testified that he was unsuccessful at arranging an appointment with Dr. Halperin's office because his office refuses to make appointments unless there is an authorization by National Employers, and no such authorization could be found. (TR 51) The record does not contain any documentation from Dr. Halperin's office indicating that Claimant tried to make an appointment and/or was refused such an appointment at that time or any time thereafter.

Frustrated after several months of failed attempts to make an appointment, Claimant self-referred himself to Dr. Frank W. Maletz of the Thames River Orthopaedic Group, L.L.C., for treatment of his back condition, and the initial visit took place on August 14, 1996. Dr. Maletz noted that Claimant had a "long history of lumbar problems" including twisting his back putting on a pool cover, severe back injury from pulling a 400 gate, and "a number of well-documented twists, falls and back injuries." The doctor found that all these incidents "have increased his symptoms now to the point where his left anterior thigh is numb all of the time." Claimant was also found to have "posttraumatic osteoarthropathy of both elbows, including tendinitis and his knees have been a significant problem," although the doctor stated that neither the elbows or the knees had been worked up or included on the list of work related injuries. Past medical problems included "a long term exposure to

cortisone and Prednisone for asthma control remotely. Also, diabetes mellitus, which is insulin dependent, hypertension managed by diuretics and kidney problems of glomerulonephritis." Claimant was found to " still (have) bilateral carpal tunnel symptoms." On physical examination, Dr. Maletz found Claimant's "(l)umbar spine show(ed) a straight lordosis with noticeable loss of range, extension is to 5 degrees, forward flexion is about 30 degrees with tenderness over both paralumbar regions." Dr. Maletz found that based on Claimant's history, that standing and sitting for even short periods of time causes increased numbness in the back, "would suggest a discogenic origin, as would his original histories of injuries." The doctor believed Claimant "should have an MRI scan of his lumbar spine to illustrate the extent to which is (sic) work related conditions have contributed to back deterioration (sic) and to his present symptoms." (CX 84, CX 97)

An MRI scan of the lumbosacral spine was conducted on September 14, 1996 by Alfred Gladstone, M.D. Dr. Gladstone concluded as follows (CX 85; RX 17):

"FINDINGS:

A far left lateral disc herniation is present at L4-5. There is impingement on the lateral aspect of the neural foramen and possible mild impingement on the exiting left L4 nerve. Mild facet and ligamentum flavum hypertrophy is present. There is no evidence of impingement on the thecal sac. No central disc protrusion is noted.

The remaining intervertebral levels are unremarkable from T12-L1 through L3-4 as well as L5-S1. There is no evidence of other disc herniation or bulge. The central spinal canal is patent. The remaining neural foramina are unremarkable. The conus medullaris tip lies at L1.

The vertebrae themselves demonstrate at least three separate areas of T1 and T2 bright rounded signal in the vertebral bodies. These are nonspecific findings but most likely represent fatty marrow rests of hemangiomas. The vertebral signal, contour and alignment is otherwise unremarkable.

"IMPRESSION:

Far left disc herniation, L4-5, with possible impingement on the left L4 nerve root.

Comparison with plain films is necessary to determine the exact disc levels prior to any operative intervention."

Dr. Maletz next saw Claimant on September 20, 1996 in order to discuss the results of the September 14, 1996 MRI scan. (CX 80) However, in a letter dated September 23, 1996, Bruce Bouley, a claims adjuster for National Employers Company, informed Dr. Maletz that Claimant was attempting to treat with the doctor without authorization. It was explained that Dr. Halperin had been authorized to treat Claimant for his continued back problems, and that Dr. Zeppieri was the treater of record only for Claimant's carpal tunnel - extremities injury.

Philo F. Willetts, Jr., M.D., examined Claimant on September 22, 1997 at the request of the Employer, and the doctor, after the usual social and employment history, his review of the tests he administered and the physical examination, reached these conclusions (CX 105 at 5-7; RX 9 at 5-7):

"DIAGNOSIS:

1. Complaints and symptoms of low back pain and MRI evidence of small disc protrusion to the left L4-5.

2. No sign of surgically herniated disc or objective neurological deficit.

3. Arthritis, right ankle, unrelated.

4. Preexisting asthma.

"DISCUSSION: I will attempt to respond to your questions in order as follows:

1. Is he currently disabled due to his injury and is it the sole cause of his disability?

I do not believe that Richard Carroll is disabled as a result of any injury of November 22, 1991.

If his history be correct, while already having started treatment for low back pain (after moving heavy planks on his home swimming pool), he pulled a gate at work on November 22, 1991, aggravated his already existing low back pain. Subsequently, that condition resolved, as apparently had three other episodes of back pain that he had claimed. In 1995, he again apparently developed back pain, when he had been out of work for months, and underwent an MRI in 1996, five years following the gate pulling episode. There is no credible evidence to isolate and focus upon the claimed gate pulling episode as the cause of his abnormal MRI. Nor is the

isolated November 22, 1991, claimed gate pulling incident either a cause or a sole cause of his disability.

2. If so, is he totally disabled or may he perform selected work?

He is not disabled by virtue of any back injury allegedly sustained on November 22, 1991. What disability he has is for other injuries.

3. If capable of light work, what restrictions would you place on him?

There would be no restrictions placed on Mr. Carroll with respect to any alleged back injury on November 22, 1991. There would be restrictions with respect to his ankle and possibly due to some of the other multiple areas of claimed injury over the years.

4. Has he reached a point of maximum medical improvement?

Yes.

5. If so, when?

I believe he reached maximum medical improvement from any possible aggravation of his back condition as of December 15, 1991, when he was given a note to return to full duty.

6. If so, what percentage of permanent functional loss of use pursuant to the fourth edition of the AMA guidelines does he have due to this condition? Please apportion the impairment specific to the injury and the impairment attributable to the pre-existing conditions or factors.

There is no credible evidence in either the history, the physical examination, the radiological imaging studies, nor the records reviewed, that there has been any permanent partial physical impairment with respect to Richard Carroll's low back, that could be credibly linked to an incident on November 22, 1991.

It is noted that Mr. Carroll injured his back several days prior to November 22, 1991, when twisting and bending to lift heavy awkward 2 by 10 planks and his swimming pool cover. He was placed out of work for two days for this condition. He then claimed to sustain increased pain when pulling a gate at work on November 22, 1991. He then recovered and returned to full duty. Only after four or five more years did he apparently acquire new low back pain when out of work for an unrelated disability. To attribute any current back condition to the events of November 22, 1991, strains credulity.

7. Is his injury of 11/22/91 causally related to his employment at Electric Boat Corporation?

If any injury occurred on November 22, 1991, as claimed from pulling a gate, then that transient aggravation of his already existing low back pain would be causally related to his employment at Electric Boat Corporation.

8. Did he have any previous condition or injury which would combine with this injury to make his present injury materially and substantially greater?

Yes. Mr. Carroll stated that he had four previous injuries to his low back, the most recent of which had been several days prior to November 22, 1991, and which occurred at home and caused lost time from work. He also had chronic asthma for which he had been rejected by the military, many years ago. Thus, his previous conditions and injuries, when combined with any possible incident of November 22, 1991, did produce materially and substantially greater injury than would have occurred from any possible alleged incident of November 22, 1991, alone.

9. Could you ask the claimant if he has worked in any capacity since his injury? What physical activity does he engage in?

He stated that other than working at Electric Boat itself, he had not worked at all or in any other capacity since November, 1991.

Currently, he stated that he spent seven hours per day at the computer on the Internet, researching Workers' Compensation laws in his efforts to represent himself in his numerous claims against his former employer. He stated he also laid down one hour per day and watched television two hours per day. He said in addition, he did yard work one hour per week including riding a lawn mower, and shopped and ran errands one hour per week. He said he rarely did housework.

Dr. Willetts reiterated his opinion at his February 9, 1998 deposition. (CX 106; RX 21) On direct examination by Employer's counsel, Dr. Willetts explained that "(a)bout 52 percent of the population over 40 years of age if run through an MRI will be found to have an abnormal disc problem in the back by an independent radiologist." (CX 106 at 13; RX 21 at 13)

Claimant's third claim involves repetitive trauma injuries to both arms and hands, which occurred prior to December 3, 1992. (CX 107). Claimant was seen at Lawrence and Memorial Occupational Health Center on August 3, 1992, but an evaluation letter was not

prepared until December 3, 1992. Martin Cherniak, M.D., M.P.H., the Director of the Occupational Health Center, reviewed the physician's notes which indicated Claimant had "a three to four year history of increasing elbow pain which is exacerbated with work and activity." Dr. Cherniak, after reviewing Claimant's medical and work histories and the findings from the physical examination, noted that it was the physician's understanding that Claimant's problem was a focal tendinitis or tenosynovitis involving his elbows, and the doctors did not feel that there was neurological impairment. Dr. Cherniak explained that the type of epicondylitis or elbow inflammation the physicians described is not uncommon in general and can clearly be exacerbated and provoked by movements of the arm involving twisting and flexing. (CX 112-114)

Dr. Amy Hopkins of Lawrence and Memorial Occupational Health Center treated Claimant from August 3, 1992 to March 25, 1992. On examination, Claimant was found to have "a mild bilateral lateral epicondylitis" which "was not severe enough to require steroid injections." Claimant was "not eligible for non-steroidal drugs because of [his] other medical problems." Dr. Hopkins gave Claimant Epilock splints for both his elbows and was instructed on the types of arm motions that would exacerbate his discomfort. The doctor felt that Claimant's "symptoms were not severe enough to warrant any work restriction at [the] time." (CX 113-115)

Dr. Jeffrey A. Salkin saw Claimant on December 23, 1993 for "bilateral elbow pain." Dr. Salkin found Claimant's x-rays to be "normal" and Claimant was "reproduceably tender over the lateral epicondyle on both sides." The doctor indicated that he would "arrange some therapy and anti-inflammatory medicine" for Claimant and would see him back in about four weeks. (CX 121)

Dr. Joseph P. Zeppieri examined Claimant on February 10, 1995 and found that Claimant's "symptoms are most consistent with carpal tunnel syndrome, however, signs are not convincing." Dr. Zeppieri also found Claimant had "some mild swelling of the wrist which would go along with arthritis, but there are no x-ray findings." The doctor ordered a bone scan for Claimant's wrists and nerve conduction studies, and he indicated he would see Claimant again when the studies were completed. (CX 119; RX 13-1) Dr. Zeppieri saw Claimant again on March 21, 1995, and he reported the bone scan was negative, "effectively ruling out Kienbock's disease and occult fracture of carpals." The nerve conduction studies were also negative. Claimant was found to have a "definite dorsal wrist syndrome" and "mild carpal tunnel syndrome on this side." Dr. Zeppieri stated that the "carpal tunnel syndrome [did] not need to be addressed surgically", but he "injected the dorsal wrist with Marcaine and Celestone, producing relief of symptoms while...in the office." Claimant was scheduled to return after two weeks, at which

time a dorsal wrist procedure would be discussed, depending on whether Claimant had "relief that last[ed] an appreciable time from the injection or had recurrences." (CX 117; RX 13-3)

Dr. Thomas C. Cherry, Jr. saw Claimant on May 17, 1995 for the purpose of an independent medical examination. Dr. Cherry's assessment was that Claimant had "a mild carpal tunnel syndrome, not one that requires surgical intervention at this time." Claimant also had "a dorsal wrist syndrome that did arise out of his work as an industrial radiographer at Electric Boat." Dr. Cherry opined "that the surgical treatment for the dorsal wrist syndrome is very likely to benefit Mr. Carroll and allow recovery of more stress-load tolerance and decreased symptoms in the hand and wrist once the recuperation period for the proposed surgery is completed." The doctor concluded that the current findings in Claimant's hands, wrists and forearms are not markedly disabling though they would limit him to semi-sedentary or light physical labor", and that a "successful outcome of the proposed surgery would allow him to restore normal or near normal use to the upper extremities." (CX 116, RX 16)

On July 3, 1995, Claimant was admitted to Lawrence and Memorial Hospital by Dr. Zeppieri for "modified arthroplasty of the right wrist." Dr. Zeppieri noted the following (CX 135):

Mr. Carroll is a 50 year-old man with about 5 years of increasing pain in the right wrist and forearm. He has had activity and post-activity aching. He has trouble holding on to a gas trimmer. He also has dysesthesias in the fingers and nocturnal symptoms, which have waxed and waned. Nerve conduction studies for carpal tunnel syndrome were negative. Nonetheless, he goes on with pain in the dorsum of the wrist and activity and post-activity aching.

Claimant had "a positive forearm compression test, but not presently, and has had other signs of carpal tunnel syndrome, which have also cleared." Dr. Zeppieri diagnosed "[d]orsal wrist syndrome, right wrist." The doctor performed the arthroplasty on Claimant's right wrist for his dorsal wrist syndrome, and he "tolerated the procedure well, emerged from anesthesia, and was transferred to the Recovery Room, in good condition." (CX 134)

Dr. Zeppieri continued to treat Claimant postoperatively. (CX 124, 130-133; RX 13-5, 13-9) On October 5, 1995, Dr. Zeppieri reported that Claimant was "having much less pain in the wrist at this point," and he had "recovered strength." Claimant still "lack[ed] about 20 degrees of full flexion in the wrist." Dr. Zeppieri found that Claimant had "obtained maximum benefit from

therapy," and that physical therapy was being discontinued. Claimant was "fit for work as far as his right wrist [was] concerned." (DX 124; RX 13-7)

Dr. Zeppieri saw Claimant on July 11, 1996, and noted that Claimant was "still having some pain in his wrist bilaterally", and he had "some dysesthesias in the fingers but these are relatively mild." Claimant had "normal range of motion in the wrist, no local tenderness" and "[m]ildly positive finger examination test." Dr. Zeppieri found that Claimant "has a 0% permanent partial impairment rating for the dorsal wrist syndrome on the right" and "has reached maximum medical improvement at this point." Claimant was to see Dr. Zeppieri in six months. (CX 122; RX 13-9)

Claimant returned to Dr. Salkin on July 15, 1996 for evaluation of his wrist, elbow, left knee and right ankle. Specifically, Claimant complained of "persistent stiffness of the right wrist following a synovial cyst excision by Dr. Zeppieri." He was also "concerned about his loss of motion." Dr. Salkin found that "[i]t does seem to be symmetric...with the opposite side." He reassured Claimant that he "felt his motion was excellent following the surgery." Radiographs of the right wrist showed no evidence of osteoarthritis. Claimant also complained of left knee pain. Dr. Salkin found that Claimant's ligaments were stable, motion and strength were full, he had no effusion and his patella tracked normally. The doctor also found that "[w]eight bearing x-rays showed no evidence of arthritis or patellar tracking abnormality." His "impression remained chondromalacia and patellar pain syndrome." Claimant was "given some quadriceps strengthening exercises and a T-Pro brace." With regards to Claimant's complaints of bilateral elbow pain, Dr. Salkin found Claimant with "80 degrees of supination and pronation bilaterally, flexion from 0-130 bilaterally." Claimant was "tender over his medial and lateral epicondyles bilaterally." Dr. Salkin stated that "x-rays of both elbows show[ed] mild degenerative arthritis of the ulnohumeral joint." The doctor's impression was of "longstanding osteoarthritis of the elbows with some overlying overuse inflammation of the medial and lateral epicondyles." No treatment was recommended for that condition. (CX 126)

On the basis of the totality of this record and having observed the demeanor and heard the testimony of a credible Claimant, I make the following:

Findings of Fact and Conclusions of Law

This Administrative Law Judge, in arriving at a decision in this matter, is entitled to determine the credibility of the

witnesses, to weigh the evidence and draw his own inferences from it, and he is not bound to accept the opinion or theory of any particular medical examiner. **Banks v. Chicago Grain Trimmers Association, Inc.**, 390 U.S. 459 (1968), **reh. denied**, 391 U.S. 929 (1969); **Todd Shipyards v. Donovan**, 300 F.2d 741 (5th Cir. 1962); **Scott v. Tug Mate, Incorporated**, 22 BRBS 164, 165, 167 (1989); **Hite v. Dresser Guiberson Pumping**, 22 BRBS 87, 91 (1989); **Anderson v. Todd Shipyard Corp.**, 22 BRBS 20, 22 (1989); **Hughes v. Bethlehem Steel Corp.**, 17 BRBS 153 (1985); **Seaman v. Jacksonville Shipyard, Inc.**, 14 BRBS 148.9 (1981); **Brandt v. Avondale Shipyards, Inc.**, 8 BRBS 698 (1978); **Sargent v. Matson Terminal, Inc.**, 8 BRBS 564 (1978).

The Act provides a presumption that a claim comes within its provisions. **See** 33 U.S.C. §920(a). This Section 20 presumption "applies as much to the nexus between an employee's malady and his employment activities as it does to any other aspect of a claim." **Swinton v. J. Frank Kelly, Inc.**, 554 F.2d 1075 (D.C. Cir. 1976), **cert. denied**, 429 U.S. 820 (1976). Claimant's uncontradicted credible testimony alone may constitute sufficient proof of physical injury. **Golden v. Eller & Co.**, 8 BRBS 846 (1978), **aff'd**, 620 F.2d 71 (5th Cir. 1980); **Hampton v. Bethlehem Steel Corp.**, 24 BRBS 141 (1990); **Anderson v. Todd Shipyards**, *supra*, at 21; **Miranda v. Excavation Construction, Inc.**, 13 BRBS 882 (1981).

However, this statutory presumption does not dispense with the requirement that a claim of injury must be made in the first instance, nor is it a substitute for the testimony necessary to establish a "**prima facie**" case. The Supreme Court has held that "[a] **prima facie** 'claim for compensation,' to which the statutory presumption refers, must at least allege an injury that arose in the course of employment as well as out of employment." **United States Indus./Fed. Sheet Metal, Inc., v. Director, Office of Workers' Compensation Programs, U.S. Dep't of Labor**, 455 U.S. 608, 615 102 S. Ct. 1318, 14 BRBS 631, 633 (CRT) (1982), **rev'g Riley v. U.S. Indus./Fed. Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). Moreover, "the mere existence of a physical impairment is plainly insufficient to shift the burden of proof to the employer." **Id.** The presumption, though, is applicable once claimant establishes that he has sustained an injury, **i.e.**, harm to his body. **Preziosi v. Controlled Industries**, 22 BRBS 468, 470 (1989); **Brown v. Pacific Dry Dock Industries**, 22 BRBS 284, 285 (1989); **Trask v. Lockheed Shipbuilding and Construction Company**, 17 BRBS 56, 59 (1985); **Kelaita v. Triple A. Machine Shop**, 13 BRBS 326 (1981).

To establish a **prima facie** claim for compensation, a claimant need not affirmatively establish a connection between work and

harm. Rather, a claimant has the burden of establishing only that (1) the claimant sustained physical harm or pain and (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused the harm or pain. **Kier v. Bethlehem Steel Corp.**, 16 BRBS 128 (1984); **Kelaita, supra**. Once this **prima facie** case is established, a presumption is created under Section 20(a) that the employee's injury or death arose out of employment. To rebut the presumption, the party opposing entitlement must present substantial evidence proving the absence of or severing the connection between such harm and employment or working conditions. **Parsons Corp. of California v. Director, OWCP**, 619 F.2d 38 (9th Cir. 1980); **Butler v. District Parking Management Co.**, 363 F.2d 682 (D.C. Cir. 1966); **Ranks v. Bath Iron Works Corp.**, 22 BRBS 301, 305 (1989); **Kier, supra**. Once claimant establishes a physical harm and working conditions which could have caused or aggravated the harm or pain the burden shifts to the employer to establish that claimant's condition was not caused or aggravated by his employment. **Brown v. Pacific Dry Dock**, 22 BRBS 284 (1989); **Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986). If the presumption is rebutted, it no longer controls and the record as a whole must be evaluated to determine the issue of causation. **Del Vecchio v. Bowers**, 296 U.S. 280 (1935); **Volpe v. Northeast Marine Terminals**, 671 F.2d 697 (2d Cir. 1981); **Holmes v. Universal Maritime Serv. Corp.**, 29 BRBS 18 (1995). In such cases, I must weigh all of the evidence relevant to the causation issue. **Sprague v. Director, OWCP**, 688 F.2d 862 (1st Cir. 1982); **Holmes, supra**; **MacDonald v. Trailer Marine Transport Corp.**, 18 BRBS 259 (1986).

In the case **sub judice**, Claimant alleges that the harm to his bodily frame, **i.e.**, his back strain, resulted from working conditions at the Employer's shipyard. The Employer has introduced no evidence severing the connection between such harm and Claimant's maritime employment. Thus, Claimant has established a **prima facie** claim that such harm is a work-related injury, as shall now be discussed. The medical evidence offered by the Employer actually goes to the nature and extent of Claimant's disability and does not rebut the existence of the November 22, 1991 injury.

Injury

The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury. See 33 U.S.C. §902(2); **U.S. Industries/Federal Sheet Metal, Inc., et al., v. Director, Office of Workers Compensation Programs, U.S.**

Department of Labor, 455 U.S. 608, 102 S.Ct. 1312 (1982), **rev'g Riley v. U.S. Industries/Federal Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). A work-related aggravation of a pre-existing condition is an injury pursuant to Section 2(2) of the Act. **Gardner v. Bath Iron Works Corporation**, 11 BRBS 556 (1979), **aff'd sub nom. Gardner v. Director, OWCP**, 640 F.2d 1385 (1st Cir. 1981); **Preziosi v. Controlled Industries**, 22 BRBS 468 (1989); **Janusiewicz v. Sun Shipbuilding and Dry Dock Company**, 22 BRBS 376 (1989) (**Decision and Order on Remand**); **Johnson v. Ingalls Shipbuilding**, 22 BRBS 160 (1989); **Madrid v. Coast Marine Construction**, 22 BRBS 148 (1989). Moreover, the employment-related injury need not be the sole cause, or primary factor, in a disability for compensation purposes. Rather, if an employment-related injury contributes to, combines with or aggravates a pre-existing disease or underlying condition, the entire resultant disability is compensable. **Strachan Shipping v. Nash**, 782 F.2d 513 (5th Cir. 1986); **Independent Stevedore Co. v. O'Leary**, 357 F.2d 812 (9th Cir. 1966); **Kooley v. Marine Industries Northwest**, 22 BRBS 142 (1989); **Mijangos v. Avondale Shipyards, Inc.**, 19 BRBS 15 (1986); **Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986). Also, when claimant sustains an injury at work which is followed by the occurrence of a subsequent injury or aggravation outside work, employer is liable for the entire disability if that subsequent injury is the natural and unavoidable consequence or result of the initial work injury. **Bludworth Shipyard, Inc. v. Lira**, 700 F.2d 1046 (5th Cir. 1983); **Mijangos, supra**; **Hicks v. Pacific Marine & Supply Co.**, 14 BRBS 549 (1981). The term injury includes the aggravation of a pre-existing non-work-related condition or the combination of work- and non-work-related conditions. **Lopez v. Southern Stevedores**, 23 BRBS 295 (1990); **Care v. WMATA**, 21 BRBS 248 (1988).

This closed record conclusively establishes, and I so find and conclude, that Claimant injured his back in a relatively minor shipyard incident on November 22, 1991, that the Employer had timely notice, authorized certain medical care and treatment, that certain benefits have been paid and that Claimant timely filed for benefits once a dispute arose between the parties. In fact, the principal issue is whether or not any current lumbar disability is causally related to that November 22, 1991 incident and, if so, the nature and extent of such disability, issues I shall now resolve.

Nature and Extent of Disability

It is axiomatic that disability under the Act is an economic concept based upon a medical foundation. **Quick v. Martin**, 397 F.2d 644 (D.C. Cir. 1968); **Owens v. Traynor**, 274 F. Supp. 770 (D.Md. 1967), **aff'd**, 396 F.2d 783 (4th Cir. 1968), **cert. denied**, 393 U.S.

962 (1968). Thus, the extent of disability cannot be measured by physical or medical condition alone. **Nardella v. Campbell Machine, Inc.**, 525 F.2d 46 (9th Cir. 1975). Consideration must be given to claimant's age, education, industrial history and the availability of work he can perform after the injury. **American Mutual Insurance Company of Boston v. Jones**, 426 F.2d 1263 (D.C. Cir. 1970). Even a relatively minor injury may lead to a finding of total disability if it prevents the employee from engaging in the only type of gainful employment for which he is qualified. (**Id.** at 1266)

Claimant has the burden of proving the nature and extent of his disability without the benefit of the Section 20 presumption. **Carroll v. Hanover Bridge Marina**, 17 BRBS 176 (1985); **Hunigman v. Sun Shipbuilding & Dry Dock Co.**, 8 BRBS 141 (1978). However, once claimant has established that he is unable to return to his former employment because of a work-related injury or occupational disease, the burden shifts to the employer to demonstrate the availability of suitable alternative employment or realistic job opportunities which claimant is capable of performing and which he could secure if he diligently tried. **New Orleans (Gulfwide) Stevedores v. Turner**, 661 F.2d 1031 (5th Cir. 1981); **Air America v. Director**, 597 F.2d 773 (1st Cir. 1979); **American Stevedores, Inc. v. Salzano**, 538 F.2d 933 (2d Cir. 1976); **Preziosi v. Controlled Industries**, 22 BRBS 468, 471 (1989); **Elliott v. C & P Telephone Co.**, 16 BRBS 89 (1984). While Claimant generally need not show that he has tried to obtain employment, **Shell v. Teledyne Movable Offshore, Inc.**, 14 BRBS 585 (1981), he bears the burden of demonstrating his willingness to work, **Trans-State Dredging v. Benefits Review Board**, 731 F.2d 199 (4th Cir. 1984), once suitable alternative employment is shown. **Wilson v. Dravo Corporation**, 22 BRBS 463, 466 (1989); **Royce v. Elrich Construction Company**, 17 BRBS 156 (1985).

This Administrative Law Judge, after reviewing the evidence in this closed record, finds and concludes that Claimant has no lumbar disability arising from his November 22, 1991 injury after December 14, 1991, that he had recovered from the temporary exacerbation of his low back pain of November 22, 1991 as of December 14, 1991 and that any disability he now experiences is due solely to the L4-5 disc herniation. Moreover, there is no medical evidence in the record which establishes the existence of Claimant's herniated disc prior to September 14, 1996, nor is there any evidence establishing a causal connection between the existence of the herniated disc and any of Claimant's work-related injuries.

Dr. Maletz was aware of Claimant's "long history of lumbar problems," and he found that all of the incidents "have increased

his symptoms now to the point where his left anterior thigh is numb all the time." The doctor concluded that based on Claimant's history, that standing for even short periods of time causes increased numbness in the back, "would suggest a discogenic origin, as would his original histories of injuries." I specifically reject the opinion of Dr. Maletz as outweighed by the forthright, probative and persuasive opinion of Dr. Willetts. Dr. Willetts found that there was "no credible evidence to isolate and focus upon the claimed gate pulling episode as the cause of his abnormal MRI," nor was the "isolated November 22, 1991 claimed gate pulling incident either a cause or a sole cause of his disability." In fact Dr. Willetts stated that "[t]o attribute any current back condition to the events of November 22, 1991, strains credulity." Dr. Willetts explained that studies have shown that [a]bout 52 percent of the population over 40 years of age if run through an MRI will be found to have an abnormal disc problem in the back by an independent radiologist." Dr. Willetts' opinion that Claimant had recovered from the effects of his November 22, 1991 incident is supported by the report of Dr. Graniero who found Claimant could return to full duty on December 15, 1991 after that temporary flare-up of back pain.

Claimant's medical evidence shows that between December 15, 1991 and August 14, 1996, he was examined by or treated with, numerous physicians, including Dr. Thomas W. Dugdale (CX 32), Dr. Joseph P. Zeppieri (CX 117-120,122,124) and Dr. Jeffrey A. Salkin (CX 121, 126). During this time period Claimant did not treat with anyone for his back, and he never once mentioned any back problems, even as an aside, to these physicians.

Accordingly, I find and conclude that the Employer's medical evidence leads inescapably to the conclusion that any disability related to Claimant's back after December 14, 1991 is due to Claimant's herniated disc, which has not been shown to be causally related to any injury Claimant incurred while working for Employer, and that he recovered from the November 22, 1991 temporary aggravation by December 14, 1991. Thus, Claimant is not entitled to any benefits for that November 22, 1991 incident.

Medical Expenses

An Employer found liable for the payment of compensation is, pursuant to Section 7(a) of the Act, responsible for those medical expenses reasonably and necessarily incurred as a result of a work-related injury. **Perez v. Sea-Land Services, Inc.**, 8 BRBS 130 (1978). The test is whether or not the treatment is recognized as appropriate by the medical profession for the care and treatment of the injury. **Colburn v. General Dynamics Corp.**, 21 BRBS 219, 22

(1988); **Barbour v. Woodward & Lothrop, Inc.**, 16 BRBS 300 (1984). Entitlement to medical services is never time-barred where a disability is related to a compensable injury. **Addison v. Ryan-Walsh Stevedoring Company**, 22 BRBS 32, 36 (1989); **Mayfield v. Atlantic & Gulf Stevedores**, 16 BRBS 228 (1984); **Dean v. Marine Terminals Corp.**, 7 BRBS 234 (1977). Furthermore, an employee's right to select his own physician, pursuant to Section 7(b), is well settled. **Bulone v. Universal Terminal and Stevedore Corp.**, 8 BRBS 515 (1978). Claimant is also entitled to reimbursement for reasonable travel expenses in seeking medical care and treatment for his work-related injury. **Tough v. General Dynamics Corporation**, 22 BRBS 356 (1989); **Gilliam v. The Western Union Telegraph Co.**, 8 BRBS 278 (1978).

In **Shahady v. Atlas Tile & Marble**, 13 BRBS 1007 (1981), **rev'd on other grounds**, 682 F.2d 968 (D.C. Cir. 1982), **cert. denied**, 459 U.S. 1146, 103 S.Ct. 786 (1983), the Benefits Review Board held that a claimant's entitlement to an initial free choice of a physician under Section 7(b) does not negate the requirement under Section 7(d) that claimant obtain employer's authorization prior to obtaining medical services. **Banks v. Bath Iron Works Corp.**, 22 BRBS 301, 307, 308 (1989); **Jackson v. Ingalls Shipbuilding Division, Litton Systems, Inc.**, 15 BRBS 299 (1983); **Beynum v. Washington Metropolitan Area Transit Authority**, 14 BRBS 956 (1982). However, where a claimant has been refused treatment by the employer, he need only establish that the treatment he subsequently procures on his own initiative was necessary in order to be entitled to such treatment at the employer's expense. **Atlantic & Gulf Stevedores, Inc. v. Neuman**, 440 F.2d 908 (5th Cir. 1971); **Matthews v. Jeffboat, Inc.**, 18 BRBS at 189 (1986).

An employer's physician's determination that Claimant is fully recovered is tantamount to a refusal to provide treatment. **Slaterry Associates, Inc. v. Lloyd**, 725 F.2d 780 (D.C. Cir. 1984); **Walker v. AAF Exchange Service**, 5 BRBS 500 (1977). All necessary medical expenses subsequent to employer's refusal to authorize needed care, including surgical costs and the physician's fee, are recoverable. **Roger's Terminal and Shipping Corporation v. Director, OWCP**, 784 F.2d 687 (5th Cir. 1986); **Anderson v. Todd Shipyards Corp.**, 22 BRBS 20 (1989); **Ballesteros v. Willamette Western Corp.**, 20 BRBS 184 (1988).

Section 7(d) requires that an attending physician file the appropriate report within ten days of the examination. Unless such failure is excused by the fact-finder for good cause shown in accordance with Section 7(d), claimant may not recover medical costs incurred. **Betz v. Arthur Snowden Company**, 14 BRBS 805 (1981).

See also 20 C.F.R. §702.422. However, the employer must demonstrate actual prejudice by late delivery of the physician's report. **Roger's Terminal, supra.**

It is well-settled that the Act does not require that an injury be disabling for a claimant to be entitled to medical expenses; it only requires that the injury be work related. **Romeike v. Kaiser Shipyards**, 22 BRBS 57 (1989); **Winston v. Ingalls Shipbuilding**, 16 BRBS 168 (1984); **Jackson v. Ingalls Shipbuilding**, 15 BRBS 299 (1983).

On the basis of the totality of the record, I find and conclude that Claimant, as a result of his November 22, 1991 incident at the shipyard, no longer requires any medical treatment after December 15, 1991 as any disability he now experiences is due solely to his herniated disc, which has not been shown to be related to any work-related injury. Any medical treatment Claimant may now require is due solely to deal with the effects of that condition.

I agree completely with Dr. Willetts when he opines that "it strains credulity" for anyone to claim that Claimant's current lumbar problems are due to a minor work incident six years ago, especially as Claimant did not seek treatment for such condition during that interval, even though he had been continually treating with a number of doctors during that time. Thus, Dr. Maletz is not authorized to act as Claimant's treating physician for his alleged lumbar problems.

Employer has authorized Dr. Zeppieri to continue to treat Claimant for his hand injury. (TR 71) Claimant seeks a change of physician to Dr. Salkin, arguing that Dr. Zeppieri is not treating him because Dr. Zeppieri gave him a zero (0) impairment rating on the right wrist and because Claimant was to see Dr. Zeppieri every six months. However, the medical evidence of record indicates that the last time Claimant saw Dr. Zeppieri was on July 11, 1996. If Claimant is having any problems relating to his hand injury, he should bring them to the attention of Dr. Zeppieri, as he is the authorized treating physician for this injury. Also, with regards to Dr. Zeppieri, Claimant asserts certain medical expenses have not been paid by Employer. Claimant specifically referred to a 20% co-payment and reimbursement for travel expenses. (CX 100-101, TR 90). As Employer has agreed to pay any outstanding medical bills with regards to Claimant's hand injury (TR 71), Claimant shall promptly present Employer with the unpaid bill and documentation regarding his travel expenses, and Employer shall make all necessary payments without delay.

Employer has accepted liability for medical bills relating to Claimant's ankle injuries, and has authorized Claimant to treat with Dr. Salkin for such injuries. (TR 69-70). Employer has also accepted liability for any outstanding bills relating to Claimant's left knee injury. If Claimant is aware of any unpaid medical bills relating to these injuries, he shall also present them to Employer for prompt payment.

Section 31(c)

Section 31(c) of the Act reads as follows:

(c) A person including, but not limited to, an employer, his duly authorized agent, or an employee of an insurance carrier who knowingly and willfully makes a false statement or representation for the purpose of reducing, denying, or terminating benefits to an injured employee, or his dependents pursuant to Section 9 if the injury results in death, shall be punished by a fine not to exceed \$10,000, by imprisonment not to exceed five years, or by both.

33 U.S.C. §931(c).

Claimant, arguing in his post-hearing brief that Employer has engaged in misrepresentations in violation of Section 31(c) of the Act, seeks relief from this Court's Order of January 16, 1998 pursuant to Rule 60(b) of the Federal Rules of Civil Procedure. (CX 138). As this issue was not raised at the formal hearing conducted on March 2, 1998, it is not properly before this Court for resolution.⁹

Section 48(a)

Section 48(a) prohibits discrimination by an employer (or his agent) against a claimant in retaliation for that claimant filing, or attempting to file, a compensation claim, or for testifying in a proceeding under the Act. **See** 33 U.S.C. §948a. As no informal

⁹ By Objection to the Employer/Self-Insured's Motion to Dismiss filed November 21, 1997, Claimant argued, *inter alia*, that delays in litigating the injuries subject to his claim were the result of misdiagnosis and/or "Employer Misrepresentation." (ALJ EX 20) Claimant referenced attached documents, but provided no rationale as to how the attached documents supported a finding of employer misrepresentation, and this Administrative Law Judge was unable to infer such a rationale.

conference has been held with regard to any of the claims presently before this Court, and as no claim pursuant to Section 48(a) has been filed, this issue cannot be properly decided by this Administrative Law Judge.

ENTITLEMENT

Since Claimant has been fully compensated For his Novemebr 22, 1991 injury, he is not entitled to additional benefits in this proceeding and his claim for benefits is hereby **DENIED**. He is presently receiving full benefits and he is subject to the so-called **Pepco** doctrine, as discussed above.

The rule that all doubts must be resolved in Claimant's favor does not require that this Administrative Law Judge always find for Claimant when there is a dispute or conflict in the testimony. It merely means that, if doubt about the proper resolution of conflicts remains in the Administrative Law Judge's mind, these doubts should be resolved in Claimant's favor. **Hodgson v. Kaiser Steel Corporation**, 11 BRBS 421 (1979). Furthermore, the mere existence of conflicting evidence does not, **ipso facto**, entitle a Claimant to a finding in his favor. **Lobin v. Early-Massman**, 11 BRBS 359 (1979).

While Claimant correctly asserts that all doubtful fact questions are to be resolved in favor of the injured employee, the mere presence of conflicting evidence does not require a conclusion that there are doubts which must be resolved in claimant's favor. **See Hislop v. Marine Terminals Corp.** 14 BRBS 927 (1982). Rather, bafore applying the "true doubt" rule, the Benefits Review Board has held that this Administrative Law Judge should attempt to evaluate the conflicting evidence. **See Betz v. Arthur Snowden Co.**, 14 BRBS 805 (1981). Moreover, the U.S. Supreme Court has abolished the "true doubt" rule in **Maher Terminals, Inc. v. Director, OWCP**, 512 U.S. 267, 114 S.Ct. 2251, 28 BRBS 43 (CRT) (1994), **aff'g** 992 F.2d 1277, 27 BRBS 1 (CRT) (3d Cir. 1993).

DAVID W. DI NARDI
Administrative Law Judge

Dated:

Boston, Massachusetts
DWD:jgg:las